Filed 1/29/10 Pardee Homes v. PacSun CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| PARDEE HOMES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PACSUN, LLC,<br><br>Defendant and Appellant. | B213300<br><br>(Los Angeles County Super. Ct. No. BC352469) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Rita J. Miller, Judge. Affirmed in full with directions.

Jackson, Demarco, Tidus & Peckenpaugh, Michael L. Titus, Edward A. Galloway and Paige H. Gosney, for Defendant and Appellant.

Sandler and Rosen, and Charles L. Birke, for Plaintiff and Respondent.

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Defendant PacSun, LLC, appeals from the judgment entered following a trial by referee that determined plaintiff Pardee Homes, Inc., was entitled to certain fee credits from its eventual dedication of land for a fire station as part of Pardee's residential development in Santa Clarita. We agree with the referee that the contract unambiguously transferred the right to those fee credits to Pardee when it bought the land from PacSun. We also alternatively hold that parol evidence was properly introduced to explain the contract terms, and that the parol evidence, along with the contractual language, supported the judgment and the referee's underlying determination.

## FACTS AND PROCEDURAL HISTORY

In 2002, the City of Santa Clarita (the city) approved a tentative tract map to allow PacSun, LLC (PacSun), to develop more than 1,300 acres of land for residential and commercial use. The city imposed numerous conditions on the map approval, including one designated BS7 that required PacSun to pay fire district impact fees of approximately $250,000. Condition BS7 alternatively allowed PacSun to donate land for a fire station site as "in lieu mitigation," thereby earning a credit for the fees that were otherwise required. PacSun designated a 1.6 acre parcel as a fire station site in order to obtain that credit. In July 2003, PacSun agreed to sell the residential portions of the land to Pardee Homes, Inc (Pardee). The parties labeled the contract the "Option Agreement" because it allowed Pardee the option to buy three distinct parcels over a set time period. Pardee eventually bought all three parcels, which included the fire station site. When PacSun claimed it was entitled to the fire district fee credits for that site, Pardee brought a declaratory relief action to resolve the dispute.[1]

Paragraph 8(a) of the Option Agreement, under the caption "Government Entitlements," said that Pardee's purchase of the residential portions of the project "shall

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[1] Earlier litigation between Pardee and PacSun over their agreements was resolved after PacSun voluntarily declared bankruptcy. As part of the bankruptcy action settlement, they stipulated that certain future disputes would be resolved by way of a reference to a retired judge. Therefore, this matter was tried before that judge, and his recommended decision was entered as the judgment of the trial court.

include all rights, titles and interests of Seller [PacSun] in and to any and all agreements, maps, permits, certificates, approvals, awards, deposits, licenses, utilities, *government entitlements and other rights and privileges relating to or appurtenant to such property.*" (Italics added.) Pardee contends this provision established its right to receive the fire site donation credits.

PacSun views paragraph 8(a) as a general provision that is controlled by another more specific portion of the option agreement that came about when the parties were negotiating. Paul Giuntini and John Jameson were PacSun's chief negotiators of the Option Agreement. Ted Cullen and John Lash represented Pardee. Cullen and Jameson took the city's tract map approval conditions and by way of certain symbols, designated each as either a shared responsibility, or one that belonged solely to their respective companies. Those items that were solely Pardee's obligations were marked with a triangle and labeled "Exclusively Residential." Those allocated to PacSun were marked with a circle and labeled "Exclusively Commercial and/or PacSun." Those to be "shared" were marked with a square. Condition BS7 for donation of the fire district site was marked with a square. Footnote 2 of that marked version of BS7 read: "Commercial site will provide Fire Station improved pad in-lieu of fees." The version of the city's approval conditions that bore these symbolic responsibility designations, along with the footnote to BS7 just mentioned, became part of the Option Agreement as Exhibit G. According to PacSun, footnote 2 expressly and unambiguously means that it was entitled to the fire station credits.

In addition to the contract terms, the court allowed parol evidence on the issue. This included evidence that Lash and Giuntini discussed how the lot costs affected the price Pardee would pay, because the higher they were, the lower the purchase price would be. It also included Cullen's deposition and trial testimony that PacSun representatives told him not to include fire mitigation fees in Pardee's cost estimates because Pardee would get the credits from dedicating the fire station site. This was supplemented by several versions of a cost analysis prepared by PacSun that were attached to a separate, but related, contract known as the Reimbursement Agreement. In

the earliest draft, prepared several months before the final version that was attached to the Reimbursement Agreement, the report contained a listing of all impact fees, including those for schools, parks, fire mitigation, and others. Under fire mitigation, the report listed a price of just under 19 cents per square foot for 386,900 square feet, bearing footnote 1 that said "[p]er client." Under the column dedicated to the amount of the various impact fees, none was given for fire mitigation. Instead, a footnote 6 was placed there, which said, "Satisfied with dedication and improvements of Fire Station site." The updated May 2003 and June 2003 versions of this report that were attached to the Reimbursement Agreement include the asterisked numbers 1 and 6 under the amount for fire mitigation impact fees, but the language of those footnotes was not included.

PacSun spent more than $298,000 making improvements to the fire station site, including infrastructure for water, natural gas, electricity, cable television and storm drains, along with curbs, gutters and a driveway apron. PacSun also graded the site, but Pardee reimbursed PacSun more than $1.7 million for doing so.

After a dispute arose as to whether PacSun or Pardee was entitled to the benefit of the fire mitigation credits, Pardee filed this declaratory relief action.[2] The referee's decision recounted the conflicting testimony of Cullen and Jameson concerning the intent and meaning of the Option Agreement as it related to the fire mitigation credits. However, the referee found that this testimony was "not significant to the outcome of the case," and chose to decide "based on the documents and an analysis of the parties' intent as gleaned from them."

The referee rejected PacSun's reliance on footnote 2 to the annotated version of Condition BS7 that was attached to the Option Agreement, which read: "Commercial site will provide Fire Station improved pad in-lieu of fees." Because fire impact fees

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[2] According to the complaint, PacSun contended it had not transferred the fire station site to Pardee when Pardee purchased the residential parcels. At trial, Jameson testified the fire station site was within the scope of the Option Agreement. The referee also found that the fire station site was included in the Option Agreement. Pardee's ownership of the fire station site is not disputed on appeal, only whether the parties' agreements gave Pardee the right to receive the fire mitigation credits.

were required as part of the residential development, it was "just as logical to conclude that 'Commercial Site' was mentioned because of its proximity to the fire station site and because some of the utility hookups and the traffic light for the station may be furnished as part of the development of the commercial property. This does not mean that the residential property was not intended to benefit from the credits as Cullen's testimony on lot costs suggests."

Instead, the referee was persuaded that paragraph 8(a) of the Option Agreement was dispositive because it transferred to Pardee the right to all government entitlements that went with the land it purchased, including the fire mitigation credits. The referee concluded it was "also logical to assume that PacSun's sale of the property transferred all rights and responsibilities for future development to Pardee as the new owner. Excluding the credits is not consistent with Section [paragraph] 8 and is not logical. The Buyer inherited the responsibilities – but also the rights and benefits – of ownership."

Judgment on the referee's recommended decision was entered by the trial court. On appeal, PacSun contends the referee erred because he did not properly interpret footnote 2 to Condition BS7 and by admitting parol evidence from Cullen, including the lot cost estimates prepared by PacSun.[3]

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[3] Pardee filed a motion to dismiss the appeal which proceeds on the assumption the referee's decision was intended to operate as a special reference under Code of Civil Procedure section 638, subdivision (b), and be given the effect of such a decision under section 644, subdivision (b). The dispute resolution procedure selected by the parties while PacSun was in bankruptcy does state that disputes under the Option Agreement are to be given effect under the latter code section, meaning that PacSun's failure to object to the statement of decision might have waived any objections to the referee's report. Pardee also contends PacSun has no record for us to review because it did not lodge the reporter's transcript with the trial court before the judgment was signed.

PacSun contends this was a general reference, and did not strip it of the right to appeal. Without belaboring the point, we believe Pardee's application for judgment created some ambiguity as to the basis under which judgment was sought, because it did not mention Code of Civil Procedure section 644, subdivision (b), and the trial court was asked to merely sign and enter judgment on the referee's report. This seems to follow section 644, subdivision (a) for general references, where the trial court enters judgment

## DISCUSSION

1. *Pardee Is Entitled to the Credits Under Option Agreement Paragraph 8(a)*

The referee said in his statement of decision that he found the testimony about the parties' intent and interpretations of the Option Agreement insignificant, and was deciding the issue based on the contract language alone. According to the referee, paragraph 8(a) transferred to Pardee the right to all government entitlements attached to the residential parcels, including the fire mitigation credits. The interpretation of a contract that does not turn upon the credibility of extrinsic evidence is a question of law calling for our independent review. If so, the contract language governs if it is clear and explicit, and we interpret the words in their ordinary and popular sense unless a contrary intent is shown. The parties' intent is determined from the contract terms alone if possible. (*Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 817.) In making this determination, we are not bound by the trial court's construction of the agreement. (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 196.)

Paragraph 8(a) said that Pardee's purchase of the residential parcels "shall include *all* rights, titles and interests of [PacSun] in and to *any and all agreements, maps, permits, certificates, approvals, . . . government entitlements and other rights and privileges relating to or appurtenant to such property.*" (Italics added.) The fire mitigation credits relate to the tract map approvals and conditions, and are appurtenant to the fire station site that was part of Pardee's land purchase. Therefore, it expressly transfers the fire mitigation credits to Pardee. PacSun does not dispute that this language,

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on the report because it stands as the decision of the court. The judgment states that it was entered under section 638, subdivision (a), which applies to general, not special references. At the hearing, the trial court said it understood the referee's decision was to be binding on the court, which accords with the effect to be given a statement of decision made under a general reference. (§ 644, subd. (a).)

Accordingly, we treat this as an appeal from a judgment entered following a general reference, and deny the motion to dismiss.

on its face, can be read as including the fire mitigation credits. Instead, it contends that footnote 2 to the annotated version of Condition BS7 attached to the Option Agreement expressly awarded it the right to those credits. Because footnote 2 is specifically aimed at the fire mitigation credits, it controls over the more general language of paragraph 8(a), PacSun contends. (Code Civ. Proc., § 1859 [particular contract provisions take precedence over inconsistent general provisions].)

As Pardee points out, paragraph 8(d) of the Option Agreement states that Exhibit G "lists the conditions of approval to the Tentative Map and sets forth the respective *obligations* to be performed by Buyer and Seller in the event of the purchase by Buyer of any Parcel. Said Exhibit contains handwritten notes regarding the specific *obligations* of each party with respect to conditions of approval for which the parties have 'shared responsibility.' " (Italics added.) Because paragraph 8(d) says nothing about who will receive any mitigation credits, it restricts Exhibit G to a list of the parties' obligations, and says nothing about their rights to any benefits or entitlements, Pardee contends.

As PacSun points out, some of the footnotes appended to Exhibit G do include an allocation of rights or benefits.[4] Therefore, some footnotes describe certain rights of the parties in connection with the obligations they must fulfill. However, only one footnote expressly mentions who shall receive mitigation credits. Footnote 8.d. states that Pardee will pay for certain bridge and thoroughfare improvements. Although the work would be performed by PacSun, Pardee "is entitled to [the] credits for . . . ." a certain portion of the roadway.

Therefore, when the parties intended to allocate mitigation credits, they chose to do so expressly and unequivocally. In order to reconcile footnotes 2 and 8.d., we must construe footnote 2 as something other than an allocation of credits. We conclude it did nothing more than define the general scope of PacSun's shared contributions to the fire station site – improving the pad – which was being dedicated in lieu of fees. When read in context with Option Agreement paragraph 8(d), it says nothing that would contradict

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[4] For instance, footnote 1 states that PacSun will build a certain sign, and Pardee can use it by paying a pro-rata share of operating costs.

paragraph 8(a)'s global transfer of all of PacSun's rights stemming from any and all agreements, maps, approvals, and government entitlements.

Because paragraph 8(a) of the Option Agreement expressly transferred the right to the fire mitigation credits to Pardee, and because footnote 2 cannot be construed as a provision awarding the fire mitigation credits to PacSun, we hold that Pardee was entitled to the fire mitigation credits as a matter of law.

2. *The Referee Did Not Rely on Parol Evidence*

The parol evidence rule is a substantive rule of law that prohibits the introduction of extrinsic evidence, oral or written, to vary or contradict the terms of a written instrument. (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175-176.) Despite the referee's statement that he was interpreting the agreement based solely on its terms, elsewhere in the statement of decision, he compared his interpretation of footnote 2 with Cullen's testimony on behalf of Pardee concerning the lot cost calculations. Even though the commercial site furnished some improvements, "[t]his does not mean that the residential property was not intended to benefit from the credits as Cullen's testimony on lot costs suggests." PacSun contends this means the referee in fact considered parol evidence concerning Pardee's interpretation of the Option Agreement despite his earlier statement that he was not doing so.

Under Code of Civil Procedure section 638, subdivision (a), the parties may agree to the appointment of a referee to hear and determine any or all of the issues in an action, whether of fact or law, and to report a statement of decision. A referee's statement of decision pursuant to such a general reference is the equivalent of a trial court's statement of decision under section 632, and we review it the same way. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) We independently review questions of law, while the substantial evidence standard applies to findings of fact. (*Ibid.*)

Because PacSun did not bring to the attention of the referee or the trial court any omissions or ambiguities in the referee's statement of decision, we will infer that the referee made implied factual findings favorable to Pardee that are necessary to support

the judgment, including any that were omitted or ambiguously resolved. We then review the implied findings under the substantial evidence standard. (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 426.)[5] Under this rule we hold that the statement of decision is ambiguous as to whether the referee in fact considered any extrinsic evidence when interpreting the contract. PacSun's failure to object or seek clarification of this point waives the issue, and requires us to resolve the ambiguity in favor of the judgment. Accordingly, we conclude that the referee did not consider any parol evidence.

3. *Even If Parol Evidence Was Considered, No Error Occurred*

Assuming for the sake of argument that the referee did rely on parol evidence from Cullen's testimony, we alternatively hold that there was no error. PacSun attacks the use of the parol evidence concerning lots costs on one ground: The evidence contradicts the fully integrated Reimbursement Agreement and therefore violates the parol evidence rule. (Civ. Code, § 1625; Code Civ. Proc., § 1856; *Casa Herrera Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 [oral or written extrinsic evidence that varies, alters, or adds to the terms of an integrated written agreement is not allowed].) PacSun contends this rule was violated because the lot cost analysis that included the footnote 6 language stating that the cost of fire mitigation would be satisfied by dedication of the fire station site is found in only an early draft. The version that was incorporated into the separate Reimbursement Agreement did not include the footnote language. Because the Reimbursement Agreement contains an integration clause, PacSun contends that evidence of the earlier draft analysis contradicts the fully integrated Reimbursement Agreement, and was therefore inadmissible. PacSun is wrong for two reasons.

First, the rule against contradicting an integrated written agreement does not apply because the lot cost analysis documents are part of the separate *Reimbursement*

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**5** The doctrine of implied findings advances three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of affirming; and (3) an appellant has the burden of providing an adequate record that affirmatively shows error occurred. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.)

*Agreement*, but were used by Pardee to describe the negotiations and explain the meaning of the *Option Agreement*. (*EPA Real Estate Partnership v. Kang*, *supra*, 12 Cal.App.4th at pp. 175-176 ["[W]hen the parties intend a written agreement to be the final and complete expression of their understanding, *that writing* becomes the final contract between the parties, which may not be contradicted by even the most persuasive evidence of collateral agreements"], italics added.) In short, Pardee did not introduce parol evidence from the Reimbursement Agreement to contradict *that* agreement, and no parol evidence violation occurred.

Second, even if the same agreement was at issue, the rule does not prohibit the use of extrinsic evidence to explain the meaning of a written contract if the contract's terms are compatible with the interpretation of the party seeking to admit that evidence. (*Casa Herrera, Inc. v. Beydoun*, *supra*, 32 Cal.4th at p. 343.) Cullen testified he was told Pardee would receive the fire mitigation credits, thereby reducing the per lot cost Pardee would pay for the land. The initial analysis prepared by PacSun states by way of footnote 6 that the fire mitigation costs would be covered by dedication of the fire site. Although the later analyses do not include the language of footnote 6, they do include the footnote number, raising an inference that the missing language was still operative. No dollar amount is shown for fire mitigation costs, and the cost total for impact fees shown in the later analyses adds up to a figure that must have added nothing for those costs. All of this is consistent with Cullen's testimony, and is also consistent with our interpretation of Option Agreement paragraphs 8(a) and 8(d). Assuming for argument's sake only that the Option Agreement was ambiguous about Pardee's right to receive the fire mitigation credits, the extrinsic evidence from Cullen about lot costs would still have been admissible to explain the meaning of the contract terms because paragraph 8(a) was reasonably susceptible to Pardee's interpretation.[6]

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[6] Although PacSun does not address whether there was insufficient evidence to support the judgment in the event we held the parol evidence was properly admitted, we believe there was. While the evidence was very much in conflict, there is ample evidence that the parties intended for Pardee to receive the fire mitigation credits. In addition to

4. *Pardee's Request for Attorney Fees*

Pardee contends it is entitled to contractual attorney fees on appeal, pursuant to a provision of the Option Agreement, but asks that we remand that issue to the trial court. Because that is the better practice (*Schaffter v. Creative Capital Leasing Group, LLC* (2008) 166 Cal.App.4th 745, 759), we will do so.

## DISPOSITION

For the reasons set forth above, the judgment is affirmed. Respondent shall recover its appellate costs. The matter is remanded to the trial court for the sole purpose of considering a motion by Pardee to recover its attorney fees on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J. LICHTMAN, J.*

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our interpretation of the contract language, and the parol evidence about lot cost representations, there are the parties' various contributions to the fire station site to consider. While there was evidence that PacSun contributed nearly $300,000 in infrastructure improvements, there was also evidence that Pardee paid nearly six times that amount to cover the grading costs. In addition, Pardee owned the land where the fire station site was located, and would therefore be giving up that 1.6 acre parcel. The parties have never contended that their shared contributions should result in shared benefits from the fire mitigation credits. It has always been all or nothing. Given the evidence of Pardee's disproportionate contributions to the fire station site, one reasonable inference is that Pardee was to receive all of the benefits.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.